

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT AUSLANDER and CAROL  
AUSLANDER,

UNPUBLISHED  
May 1, 2007

Plaintiffs-Appellees,

v

ALLAN W. CHERNICK, M.D.,  
CARDIOVASCULAR SPECIALISTS, P.C.,  
HOWARD S. GOLDBERG, M.D., and HOWARD  
S. GOLDBERG, M.D., P.C.,

No. 274079  
Oakland Circuit Court  
LC No. 2004-061286-NH

Defendants-Appellants.

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Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

JANSEN, J. (*dissenting*).

In this medical malpractice case, plaintiffs' counsel inadvertently failed to attach the required affidavits of merit to the complaint. The circuit court ruled that defendants had waived their asserted affidavit-of-merit and statute-of-limitations defenses by failing to timely raise them in their first responsive pleading. The majority now concludes that the circuit court did not err in this regard. I respectfully dissent.

I fully acknowledge that a defendant must raise certain defenses in its first responsive pleading, and that a failure to do so may result in the waiver of those defenses. See MCR 2.111(F)(2); MCR 2.111(F)(3). However, I conclude that defendants were never required to raise or plead their asserted defenses in the first instance because this medical malpractice action was never properly commenced.

Plaintiffs' claims arose, at the latest, at the time of the myocardial infarction in March 2003. "[T]he mere tendering of a complaint without the required affidavit of merit is insufficient to commence [a medical malpractice] lawsuit," and therefore does not toll the two-year period of limitations. *Scarsella v Pollak*, 461 Mich 547, 549-550; 607 NW2d 711 (2000). In this case, plaintiffs wholly omitted to file the requisite affidavits of merit, and their complaint of September 2004 was therefore insufficient to toll the limitations period. *Id.* Regardless whether defendants properly raised and preserved the statute-of-limitations and affidavit-of-merit defenses in their first responsive pleading, the period of limitations was not tolled by plaintiffs' complaint, and plaintiffs' claims were already time-barred at the time of the circuit court's

ruling. *Id.* at 553. I would reverse and remand for dismissal with prejudice of plaintiffs' claims. MCR 2.116(C)(7); *Scarsella, supra* at 551-552.

/s/ Kathleen Jansen